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No. 87-372

In the Supreme Court of the United States

OCTOBER TERM, 1987

AMOCO PRODUCTION COMPANY, PETITIONER

v.

DONALD P. HODEL, SECRETARY,
DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in a dispute over the proper valuation of natural gas extracted from submerged lands pursuant to a lease issued under authority of the Outer Continental Shelf Lands Act, 43 U.S.C. (& Supp. III) 1331 *et seq.*, the Claims Court has exclusive jurisdiction under the Tucker Act to adjudicate a suit to recover moneys that have been paid under protest to the Secretary of the Interior, and deposited into the United States Treasury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A35) is reported at 815 F.2d 352. The opinion of the district court (Pet. App. A36-A48) is reported at 627 F. Supp. 1375. The opinion of the Interior Board of Land Appeals (Pet. App. A49-A64) is reported at 78 I.B.L.A. 93.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on April 29, 1987. On July 17, 1987, Justice White extended the time within which

to file a petition for a writ of certiorari to and including August 27, 1987, and the petition was filed on that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action concerns the amount of royalties that petitioner was required to pay to the Department of the Interior (DOI) between February 1977 and December 1979. Petitioner has paid the disputed amount under protest. The district court, after rejecting a challenge to its jurisdiction, entered summary judgment "in favor of the government and against [petitioner] for the latter's liability for underpaid royalties and interest from February 1977 through December 1979" (Pet. App. A48). The court of appeals vacated the district court's judgment on the ground that the court lacked jurisdiction (*id.* at A2-A35). Petitioner challenges the jurisdictional determination of the court of appeals.

1. a. The Secretary of the Interior (Secretary) issues oil and gas leases under the Outer Continental Shelf Lands Act (OCSLA or Act), 43 U.S.C. (& Supp. III) 1331 *et seq.* The Secretary's regulations, as pertinent here, provided that "[t]he value of production, for the purpose of computing royalty, shall be the *estimated reasonable value of the product*," determined by considering, among other things, "the highest price paid for a part or for a majority of production of like quality in the same field or area" (30 C.F.R. 250.64 (1977) (emphasis added) (current version codified at 30 C.F.R. 206.150)). See also 43 U.S.C. 1337.

On November 15, 1974, petitioner, as joint tenant with Gulf Oil Corporation (Gulf) and Mobil Oil

Corporation (Mobil), leased Block 23 of the Vermilion Area off the coast of Louisiana (A.R. 231-235 [1]). Under the lease, petitioner agreed to pay the United States a "royalty of 16⅔ percent in amount or value of production saved, removed, or sold from the leased area" (A.R. 231-232). Petitioner further agreed that performance under this lease covenant would be subject to regulations issued by the Secretary pursuant to the Act (A.R. 231).

Block 23 proved to contain commercially recoverable quantities of natural gas. On January 14, 1977, petitioner formally requested the United States Geological Survey (USGS) to determine a royalty value that would govern petitioner's royalty payments for its share of production from the lease (A.R. 7, 336). In response, on February 1, 1977, the USGS issued a valuation determination letter. The letter established the royalty valuation for petitioner's share of the gas at roughly $1.50/Mcf (thousand cubic feet) (A.R. 336-338).[2] Although petitioner was entitled to take an administrative appeal from that valuation determination within 30 days (30 C.F.R. 250.81, 290.3 (1977); A.R. 7), petitioner did not do so.

Nevertheless, petitioner did not pay the royalties that were due under the valuation determination letter. Instead, petitioner paid royalties computed by valuing its gas at $0.2125/Mcf (A.R. 339-351)—only a small fraction of the royalties due under the agency's valuation determination. Petitioner based

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[1] "A.R." refers to the record of administrative proceedings filed with the district court.

[2] The base price, $1.43/Mcf, was subject to escalation adjustments and was adjusted according to energy content; in addition, the complex formula contained gathering and transportation allowances (A.R. 337).

its computation of royalties on the price it received for the gas. Petitioner chose to use its share of the natural gas produced from Block 23 to meet its obligations under a contract with Florida Power & Light Co. (FP&L). That contract was executed on March 12, 1965 (A.R. 90, 130), and reflected 1965's comparatively low price levels. Petitioner's co-lessees, Mobil and Gulf, sold their shares of the identical natural gas, and computed their royalties, at prices of between $1.562 and $1.707/Mcf during the relevant period (A.R. 219-225).

The Minerals Management Service (MMS) audited petitioner's royalty payments under the lease for the period from January 1977 through December 1979 (A.R. 333) and determined that petitioner had underpaid the United States $10,424,298.62 for that period (A.R. 333-334).[3] Petitioner paid that amount (plus late charges) (Pet. App. A5) and pursued administrative appeals. As required by statute (43 U.S.C. 1338), the monies were "deposited in the Treasury of the United States and credited to miscellaneous receipts."

b. In the administrative proceedings, petitioner presented a series of equitable and legal arguments with respect to both the underpayments and the late charges. All of those arguments were ultimately abandoned except one: petitioner contended that the agency's 1977 valuation determination could not be

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[3] Most of the shortfall was attributed to petitioner's failure to compute royalties based on the February 1, 1977, valuation determination. But it was also determined that petitioner had improperly "deleted gas volumes bypassed around the gas processing plant" and failed to include "residue gas used as dehydration station fuel" (A.R. 333).

used after December 1, 1978, when the provisions of the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.* (NGPA), became effective. Specifically, petitioner argued that under Section 105 of the NGPA, 15 U.S.C. 3315,[4] the below-market prices petitioner had received for its share of the gas at Block 23 had become a ceiling price under the NGPA, and that this ceiling price imposed a cap on the value of the gas for royalty computation purposes.

On December 19, 1983, in a final administrative decision, the Interior Board of Land Appeals (IBLA)[5] upheld MMS's assessment of royalties for the period ending December 1979 (Pet. App. A49-A64). The IBLA rejected petitioner's interpretation of Section 105 of the NGPA (Pet. App. A49-A64). It held that Section 105 did not control (Pet. App. A58) because the 1965 contract between petitioner and the buyer, FP&L, was a "warranty" contract

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[4] Section 105, in pertinent part, states (emphasis added):

> (a) **Application**
>
> The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of natural gas delivered during any month in the case of natural gas, *sold under any existing contract* * * *.
>
> (b) **Maximum lawful price**
>
> (1) **General rule**
>
> * * * [T]he maximum lawful price under this section [for any month] shall be the lower of—
>
> (A) the price under the terms of the existing contract, *to which such natural gas was subject* on November 9, 1978, as such contract was in effect on that date * * *.

[5] The IBLA is a subdivision of the Office of Hearings and Appeals within DOI.

that required petitioner to deliver certain quantities of gas at the specified price, but did not require that any particular gas, including the gas produced under the Block 23 lease, be used to satisfy those requirements. (Indeed, the FP&L contract was entered into almost ten years before petitioner signed the Block 23 lease.) The IBLA also stressed that petitioner's business decision to meet its warranty contract commitments with gas from the lease could not be used to deprive the United States of proper royalties (*id.* at A61-A62 (emphasis added)):

> [Petitioner] had simply chosen to satisfy its contractual obligations to FP&L by delivering gas from OCS-G 2866. *That business election cannot bind the United States to accept a lower royalty than it otherwise would be entitled had* [*petitioner*] *chosen some other source of supply for FP&L.*

2. On April 6, 1984, petitioner commenced this litigation by filing a complaint against the Secretary and the Director of MMS in the United States District Court for the Western District of Louisiana. Petitioner sought to invoke the district court's jurisdiction under 43 U.S.C. 1349(b)(1), 28 U.S.C. 1331, and 28 U.S.C. 1337 (see Pet. 7). Petitioner prayed for a declaration that the IBLA decision was arbitrary and capricious and inconsistent with "law," the Secretary's regulations, and the Fifth Amendment to the Constitution (Complaint at 9). Petitioner also asked for a remand of the administrative decision to DOI "to properly calculate the underpaid royalties" (*ibid.*). The government moved to dismiss on the ground that the suit was a claim for money damages against the United States; that none of the

statutes cited in the complaint authorized the entry of such a judgment by the district court; and that exclusive jurisdiction to entertain the suit was vested in the United States Claims Court under the Tucker Act, 28 U.S.C. 1491. The district court denied the motion without opinion. Subsequently, on the parties' cross-motions for summary judgment, the district court ruled in favor of the government on the merits.

3. Notwithstanding the favorable judgment, on petitioner's appeal the government once again challenged the jurisdiction of the district court. The government again argued that this was a suit against the government for money damages, cognizable only in the Claims Court. Petitioner, in response, "conceded * * * both that it does seek the eventual return of its money and that money would 'flow from,' or be the 'natural consequence' of, a determination that the DOI improperly valued the gas for royalty purposes" (Pet. App. A22; see also *id.* at A28 & n.15). But, petitioner said, its suit "[was] not *merely* a suit for money damages and thus [was] not cognizable under the Tucker Act" (C.A. Reply Br. 5 (emphasis added; footnote omitted)). Although petitioner had sought both retrospective relief and arguably prospective relief in its complaint,[6] petitioner

[6] Petitioner's complaint explicitly sought retrospective relief. It asked the court to "[a]djudge and declare that the decision in *Amoco Production Company*, 78 IBLA 93, issued on December 19, 1983, is void and ineffective because, for the period June 1, 1978, through December, 1979, the decision is arbitrary, capricious, and erroneous, and constitutes an abuse of the Secretary's discretion" (Complaint at 9). Likewise, the complaint asked the court to "[r]emand the decision to the Department of Interior to properly calculate the underpaid royalties due during the period February, 1977,

did not suggest that its action be split into two actions, a claim for money damages cognizable in the Claims Court and a claim for prospective relief cognizable in the district court.

A unanimous panel of the Fifth Circuit agreed with the government's position. The court of appeals held that petitioner's suit was an action against the United States (Pet. App. A15); that it was founded on the Constitution, a federal statute or regulation, or government contract (*id.* at A15-A18); and that, in "essence," petitioner's claim was one for money damages in excess of $10,000 (*id.* at A18-A34). The court of appeals held that the Claims Court enjoyed exclusive subject-matter jurisdiction over the action under the Tucker Act. The court of appeals made it clear, however, that it would have reached a different result if petitioner had not, before instituting suit, paid the disputed sums to the government (Pet. App. A19 n.10). The judgment of the district court was vacated (*id.* at A35), and the case was remanded to the district court with instructions to transfer the case to the Claims Court pursuant to 28 U.S.C. 1631.

Petitioner did not seek rehearing, nor did petitioner seek a stay of the Fifth Circuit's mandate that the case be transferred. The case was duly remanded to the district court, which, pursuant to the Fifth Circuit's mandate, transferred the case to the Claims Court. On June 11, 1987, all records of the district court were received by the Claims Court, where the proceeding is now docketed (Cl. Ct. No. 344-87).

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through May, 1978, and the interest penalties due on the late payments" (*ibid.*). Arguably, petitioner's complaint also sought prospective relief, in that it asked that the court "[p]ermanently enjoin and restrain the defendants * * * from enforcing or applying the decision" (*ibid.*).

ARGUMENT

There are two considerations, apart from the merits of the decision below, that make review of this case in this Court inappropriate: the district court has already relinquished jurisdiction over this case, and the IBLA has made clear that in most cases it will not require lessees to pay disputed amounts and sue for their recovery in order to adjudicate controversies over royalty payments. As to the jurisdictional questions presented in the petition (Pet. i), the court of appeals correctly decided an issue of first impression, and there is no conflict between the decision below and any decision of this Court or another court of appeals. The decision below does conflict with a recent decision of another court of appeals (from which we are seeking a writ of certiorari) with respect to the question whether an action seeking both retrospective and prospective relief against the United States can be divided into two actions, one heard by the district court and the other by the Claims Court. But petitioner never sought such bifurcation in the courts below, and this issue does not appear to be encompassed by the questions presented in the petition.

1. a. Petitioner would have this Court review the jurisdictional holding of the court below and, if successful, would have this Court vacate the decision of the court of appeals and remand the case for further proceedings on the merits. There is, however, no longer any case pending within the Fifth Judicial Circuit for that court of appeals to adjudicate.

The United States District Court for the Western District of Louisiana lost all jurisdiction when the files were physically transferred to the Claims Court.

The transfer of the files not only deprived the district court of jurisdiction, but the regional court of appeals as well. *Starnes* v. *McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc); *In re Sosa*, 712 F.2d 1479, 1480 (D.C. Cir. 1983) (per curiam); *In re Southwestern Mobile Homes, Inc.*, 317 F.2d 65, 66 (5th Cir. 1963); see also 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3846, at 357 (1986). If petitioner wished to preserve the jurisdictional issues for this Court to review, it should have sought a stay of the decision below in order to prevent the transfer of the records until disposition of a petition for a writ of certiorari. Petitioner sought no such relief in the interim between April 29, 1987 (when the court of appeals rendered its decision), and August 27, 1987 (when it filed its petition).[7] Petitioner thus did not take the appropriate steps to preserve the jurisdictional issues for this Court's review.[8]

b. A recent change in policy by the IBLA greatly diminishes the practical significance of the Fifth Circuit's decision. The Fifth Circuit's holding is limited

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[7] Petitioner did not even seek rehearing in the court of appeals.

[8] The transferee forum here has jurisdiction, whether or not the transferor forum had jurisdiction (as petitioner claimed it did). The Claims Court will review the merits of petitioner's claims and, if it agrees with petitioner, will grant petitioner a money judgment and may also remand the case to the agency with appropriate instructions (28 U.S.C. 1491(a)(2)). That court's predecessor has, indeed, reviewed similar cases in the past. See *Foote Mineral Co.* v. *United States*, 654 F.2d 81 (Ct. Cl. 1981). Accordingly, the transfer of this case to the Claims Court will not deprive petitioner of its day in court, only of its preferred forum.

to payment-under-protest cases: "If [petitioner] had not paid, the government would have had to pursue [petitioner] for the royalties and late fees. That clearly would not be [a] Tucker Act claim." Pet. App. A19 n.10. The IBLA has recently held, however, that under its current regulations DOI must allow a suspension or stay of an order to pay pending an administrative appeal, on condition of posting adequate bond for the amounts in dispute, unless it finds that such suspension would be detrimental to the lessor. *Marathon Oil Co.*, 90 I.B.L.A. 236 (1986). In most cases, plaintiffs such as petitioner who wish to adjudicate their cases in district court rather than the Claims Court now will be able to do so by requesting such a stay and posting a bond. Because they will be seeking to prevent the government from taking money from them, rather than seeking the return of money paid to the government, their actions will not (according to the decision below) be governed by the Tucker Act.[9]

Accordingly, the number of future litigants who will be in a situation similar to petitioner's can be expected to be quite small, and the decision below will have little lasting impact in actions to review IBLA decisions.[10]

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[9] In this proceeding, the administrative record does not reflect any request by petitioner for relief from the payment requirement. Petitioner is, however, currently pursuing another suit challenging royalty computations. *Amoco Prod. Co.* v. *Hodel*, Civ. No. 87-0243 (W.D. La.). In that case, petitioner has obtained a bond and does not seek a money judgment against the United States.

[10] Petitioner notes that there are some litigants who have already paid disputed sums rather than posting bonds, and

2. On the merits, petitioner suggests that "[t]his Court should grant certiorari * * * because this decision would establish for the first time * * * the jurisdictional relationship between the United States Claims Court under the Tucker Act and the United States district court under the OCSLA" (Pet. 11). As petitioner recognizes, however, the decision below is the first to address the OCSLA issues that petitioner raises. Thus, there is plainly little need for this Court to address those issues at this juncture. Petitioner further contends that the decision below rests on "a rationale that conflicts with prior reasoning of * * * other circuit courts" in cases involving statutes other than the OCSLA (*ibid.*). But this alleged conflict in "rationales" is largely immaterial.[11] "This Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

The court below, in deciding an issue of first impression, correctly held that the monetary part of this action was maintainable only in the Claims Court

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speculates that some future litigants will be in such financial distress that they will be unable to post bonds (Pet. 20-21). But the fact that the decision below may affect a small class of future litigants, rather than none at all, hardly makes it a decision of such widespread impact and importance as to merit this Court's review.

[11] Petitioner also suggests a conflict between the "rationale" of the decision below and the "reasoning" of this Court (Pet. 11), but that suggestion turns out (see Pet. 13) to be based entirely on what this Court supposedly "implie[d]" in *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 172-181 (1976). Such an attenuated claim of conflict does not warrant this Court's review.

under the Tucker Act.[12] Petitioner, however, contends (Pet. 11-16) (1) that there are situations in which an action that is cognizable in the Claims Court under the Tucker Act may nevertheless be heard in district court under a different statute that waives the sovereign immunity of the United States for claims for money damages, and (2) that the OCSLA is such a statute. We assume, arguendo, that petitioner's first proposition is correct. Even so, petitioner's second proposition is incorrect.

This action seeks money damages and, as petitioner recognizes (Pet. 15 & n.10 (citing *United States* v. *Testan*, 424 U.S. 392, 400 (1976)), the applicable waiver of sovereign immunity must therefore be one that applies to actions for money damages. The Tucker Act certainly is such a waiver.[13] But no sec-

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[12] As to the court's failure to divide the case into a nonmonetary (prospective) claim that could be pursued in the district court, and a monetary claim that could be pursued only in the Claims Court, see pp. 16-17, *infra*.

[13] The Tucker Act waives sovereign immunity to permit an action for money damages in all cases to which it applies. *United States* v. *Mitchell*, 463 U.S. 206, 212-216 (1983). In order for the Tucker Act to apply, "the claimant must demonstrate that the source of substantive law he relies upon ' "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." ' " *Id.* at 217 (quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976), quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)). The court of appeals here correctly held (Pet. App. A18) that this requirement for Tucker Act jurisdiction is met in this case. In *United States* v. *Laughlin*, 249 U.S. 440, 442-443 (1919), this Court held that a statute worded virtually identically to Section 10(a) of the OCSLA, 43 U.S.C. 1339(a), was a source of substantive law that entitled a claimant to bring a Tucker Act action in the Court of Claims. See also *Foote Mineral Co.* v. *United States*, 654 F.2d 81, 84 (Ct. Cl. 1981).

tion of the OCSLA constitutes such a waiver, and no court has ever held that any such waiver exists in the OCSLA.[14]

Section 23 of the OCSLA, 43 U.S.C. 1349, does waive the sovereign immunity of the United States, and it provides for actions in district court. But nothing in Section 23 contemplates the availability of money damages against the United States. That section, added to the OCSLA in 1978 and based on a bill first introduced in 1974, is primarily intended to permit citizen suits to ensure compliance with the OCSLA. See Pub. L. No. 95-372, § 23(a), 92 Stat. 657; S. Rep. 93-1140, 93d Cong., 2d Sess. 31 (1974).[15] Thus, many actions against the United

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[14] Petitioner concedes that it can point to "no reported case [that] has discussed the jurisdictional grant and waiver of sovereign immunity contained in the OCSLA in explicit terms" (Pet. 16). Petitioner goes on to suggest (*ibid.*) that certain decisions in which the issue *could* have been discussed support petitioner's construction of the OCSLA. But the government did not raise, in any of the cases petitioner cites, the objection to district court jurisdiction that was raised in this case. Therefore, they are not precedent against that objection. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511 (1925). That rule applies fully to jurisdictional objections. See, *e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 119 & n.29 (1984); *Hagans* v. *Levine*, 415 U.S. 528, 534-535 n.5 (1974); *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37-38 (1952); *United States* v. *More*, 7 U.S. (3 Cranch) 159, 172 (1805) (Marshall, C.J.).

[15] See also S. Rep. 93-1140, *supra*, at 148-149 (minority views) (list of types of actions that could be brought under section of original bill that eventually became Section 23; list does not include any actions for money damages).

States or its agents or instrumentalities for relief other than money damages are brought in district court under Section 23. See, *e.g.*, *Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151 (1981) (action to force Secretary of the Interior to promulgate new bidding systems); *Superior Oil Co.* v. *Andrus*, 656 F.2d 33 (3d Cir. 1981) (action to compel issuance of a lease). Section 23 uses language that contemplates injunctive relief, not payment of money—"a civil action * * * to *compel compliance* with this subchapter" (43 U.S.C. 1349(a) (emphasis added)).

The only provision of Section 23 that explicitly discusses the payment of money refers not to money damages but to the payment of such incidental items as "costs of litigation, including reasonable attorney and expert witness fees" (§ 23(a)(5), 43 U.S.C. 1349(a)(5)). Petitioner's apparent contention (Pet. 15) that a general waiver of sovereign immunity for money damages can be inferred from such a fees provision is, to say the least, novel. Consent to the award of costs, including attorneys' fees and expert witnesses' fees, can hardly be equated with consent to the award of a money judgment on a substantive legal claim. Cf. *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986) (consent to award of money judgment on a substantive legal claim cannot be equated with consent to award of interest on that judgment).

Nor does Section 10 of the OCSLA, 43 U.S.C. 1339, constitute consent to the award of money damages.[16] That section is merely a mechanism for making refunds of overpayments *found by the Secretary of the Interior*. Section 10(a), 43 U.S.C. 1339(a), provides

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[16] Section 10 is quoted in full at pages 5-6 of the petition.

that the Secretary of the Interior may certify overcollections to the Secretary of the Treasury, who is then authorized and directed to make repayment; Section 10(b), 43 U.S.C. 1339(b), requires a report to Congress justifying the proposed repayment. Nothing in the statute suggests that this mechanism, designed for processing repayments *agreed to* by the government, authorizes a district court to enter a money judgment against the United States in a case where the Secretary of the Interior refuses to issue the certification. Given that waivers of sovereign immunity must be clearly expressed,[17] the provisions of Section 10 cannot support petitioner's argument that the OCSLA, rather than (or in addition to) the Tucker Act, provides the necessary waiver of sovereign immunity for money damages.[18]

3. Petitioner in this case arguably seeks not only monetary relief but also prospective relief (see note 6, *supra*). And, in the body of its petition (but not in the questions presented), petitioner asserts (Pet. 16-17) that in these circumstances the court of ap-

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[17] See, *e.g.*, *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 7 (internal quotation marks and citations omitted) ("[i]n analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign * * * and not enlarge the waiver beyond what the language requires").

[18] To be sure, Section 10, when coupled with the waiver of sovereign immunity for money damages in the Tucker Act, is a sufficient implication of a right to compensation that an action will lie in the Claims Court (see note 13, *supra*). But there is no basis for petitioner's additional bald assertion (Pet. 15 n.11) that *by itself* "Section 10 can also be interpreted as a waiver of sovereign immunity for claims for the refund of excess royalties." Nothing in Section 10 even remotely purports to be a waiver of sovereign immunity.

peals should have retained jurisdiction over its request for prospective relief "[e]ven if * * * Claims Court jurisdiction under the Tucker Act is exclusive in this case" (Pet. 16).

The circuits are in fact divided on the question whether a case presenting both a claim for monetary relief and a request for prospective relief involving the same issues can be split into two lawsuits. We are today filing a petition for a writ of certiorari to review the disposition of this issue by the First Circuit in *Massachusetts* v. *Secretary of Health & Human Services*, 816 F.2d 796 (1987), petition for cert. pending *sub nom. Bowen* v. *Massachusetts*, No. 87-—. We are serving a copy of our *Massachusetts* petition on counsel for petitioner. However, given that this issue is not included in petitioner's questions presented (Pet. i), given that petitioner did not seek to have the action split in that manner in the courts below, and given that the district court has transferred the case to the Claims Court, we submit that the Court should not grant the petition in this case to review this issue, nor should the Court hold this case pending disposition of the petition in *Massachusetts*.[19]

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[19] We note that *Massachusetts* involves the common situation in which the general review provisions of the Administrative Procedure Act (APA) are alleged to waive sovereign immunity for the adjudication of claims for prospective relief, and thus to permit splitting such claims from Tucker Act claims and adjudicating each claim in a different forum. See *Massachusetts*, 816 F.2d at 800; see also, *e.g.*, *New Mexico* v. *Regan*, 745 F.2d 1318, 1321 (10th Cir. 1984) (rejecting APA-based argument for claim splitting), cert. denied, 471 U.S. 1065 (1985); *Minnesota ex rel. Noot* v. *Heckler*, 718 F.2d 852, 858 (8th Cir. 1983) (accepting APA-based argument for claim splitting); *Warner* v. *Cox*, 487 F.2d 1301,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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1304-1305 (5th Cir. 1974) (rejecting APA-based argument). The present case does not involve a contention that the APA provides a basis for retaining the non-monetary relief portion of the controversy, but rather involves the OCSLA and its own waiver of sovereign immunity for non-monetary claims. Although we do not think that the APA and OCSLA ultimately lead to any difference in the outcome of the claim-splitting issue, a decision by this Court endorsing or rejecting claim splitting in an APA case (or would-be APA case) such as *Massachusetts* would resolve an issue of more general importance than would a decision in this case.

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